Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF BARTHOLDI CABLE COMPANY, INC.

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SUMMARY

The record in this proceeding demonstrates widespread support for Bartholdi's proposal to relocate the cable demarcation point in MDUs to the point where the individual subscriber line connects to the common feeder line. The Commission should adopt this proposal so that consumers who live in these types of buildings may access the facilities of competing telecommunications service providers and share in the benefits of a competitive market.

The franchised cable interests urge the Commission to reject this proposal because they claim it would violate the express language of the 1992 Cable Act, the Congressional intent embodied in the Telecommunications Act of 1996, and the takings provision of the Fifth Amendment to the Constitution. These claims are unavailing and must be rejected. Relocating the demarcation point as Bartholdi has proposed is entirely consistent with the Commission's authority under Title I of the Communications Act and would not violate any statutory or Constitutional directive. Moreover, such action is a necessary step in giving consumers a meaningful choice of broadband services.

Finally, since the existing approved technical procedures for testing signal leakage are outmoded when applied to multiple MVPDs operating in close proximity to each other in an MDU, the Commission should open a separate rulemaking proceeding to address these technical issues.

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Bartholdi Cable Company, Inc. ("Bartholdi") (formerly known as Liberty Cable Company, Inc.), by its attorneys, submits these Reply Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.[1/]

I. THE COMMISSION SHOULD REDEFINE THE CABLE DEMARCATION POINT FOR MDUs AS THAT POINT WHERE THE INDIVIDUAL SUBSCRIBER LINE CONNECTS TO THE COMMON FEEDER LINE.

The record demonstrates widespread support for Bartholdi's proposal to relocate the cable demarcation point in multiple dwelling units ("MDUs") to the point where the individual subscriber line connects to the common feeder line.[2/] Redefining

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[1/] Liberty Cable Company, Inc. filed Comments in the above-captioned proceeding.

[2/] See, e.g., Ameritech at 8; AT&T at 7-8; CAI Wireless Systems at 2; Compaq Computer at 36; DirecTV at 8; GTE at 3-4; Heartland Wireless Communications at 2; Independent Cable and Telecommunications Association ("ICTA") at 22, 28; Interactive Cable Systems at 2; Media Access Project and Consumer Federation of America ("Media Access") at 10; Multimedia Development Corp. at 13-14; Multi-Technologies Services at 2; New Jersey Board of Public Utilities at 6-7; NYNEX at 7; OpTel at 10-11; Pacific Bell at 3; Residential Communications Network at 3-5; Stellarvision at 1-2; USTA at 3; Wireless Cable Association International at 10.

the demarcation point in this manner will stimulate competition among multichannel video programming providers ("MVPDs") and increase the variety of programming and telecommunications services available to MDU residents. Predictably, monopolist cable operators strongly oppose this proposal. As we show below, however, the statutory, constitutional and competitive arguments raised by these parties lack merit and, therefore, must be rejected by the Commission.

A. The 1992 Cable Act Does Not Prohibit the Commission from Relocating the Demarcation Point in MDUs to the Point Where the Common and Dedicated Wiring Meets.

Several cable interests suggest that the Commission lacks statutory authority to prescribe rules governing cable wiring located outside the subscriber's dwelling unit.[3/] This is incorrect. Media Access Project and others accurately assert that the Commission has authority to set the demarcation point outside the subscriber's dwelling unit, where the subscriber's dedicated line meets the common feeder line.[4/]

[3/] See, e.g., Adelphia Communications at 1-2; Cable Telecommunications Association ("CTA") at 2; Continental Cablevision at 27-28; Cox Communications at 13-14; ICTA at 9; National Cable Television Association ("NCTA") at 12-14; Time Warner at 11-12; TKR Cable at 10-11.

[4/] See, e.g., AT&T at 10-14; Compaq Computer at 44-50; Media Access at 12; OpTel at 11.

1. The FCC has authority under Title I of the Communications Act to regulate all cable wiring.

As demonstrated by the FCC's regulation of cable beginning in the 1950s, the Commission needs no specific statutory authorization to regulate cable wiring. The Supreme Court settled the issue of the Commission's authority over cable in 1963, long before there was a Cable Act.[5] The FCC's general authority to regulate cable television derives from Title I of the Communications Act of 1934 (the "Act") which grants the FCC power to regulate "all interstate . . . communications by wire or radio."[6] This authority is not limited to communications that actually cross state lines, or that have a direct effect on broadcasting.[7] Nor is it limited to the specific grants of authority found in other Titles of the Act, such as authority over licenses and carriers.[8]

Under its broad Title I authority, the FCC "retain[s] exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards."[9] The Commission has exercised this jurisdiction in

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[5] See United States v. Southwestern Cable Co., 392 U.S. 157 (1963).

[6] 47 U.S.C. § 152(a).

[7] See, e.g., Coffey County Community TV Co., 58 FCC 2d 1171, 1173-75 (1976).

[8] Southwestern Cable, supra note 5, at 173 n.37.

[9] Capital Cities Cable v. Crisp, 467 U.S. 691, 702 (1984). The FCC's authority to regulate telephone inside wiring similarly derives from Title I. See Detariffing the Installation and (continued...)

the past to protect the predominant federal interest in the use of all wiring carrying interstate video signals within an MDU,[10] and should exercise its jurisdiction now to move the demarcation point as proposed herein.

2. The FCC's Title I authority to regulate inside wiring is not limited by Congress' enactment of the Cable Communications Policy Act of 1984 or the 1992 Cable Act, including Section 624(i) of the Communications Act.

Passage of the Cable Communications Policy Act of 1984 and the 1992 Cable Act did not diminish the Commission's power to "[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of [the Act],"[11] including the cable television provisions in Title VI of the Act.[12] Nor did these enactments abridge the scope of the Commission's jurisdiction over cable as described by the Supreme Court in 1963.

Given the Commission's broad and longstanding authority to regulate cable facilities and equipment, the commenters are reduced to arguing that Section 624(i) of the Act, which was added by the 1992 Cable Act, somehow limits the Commission's authority to

[9] (...continued)
Maintenance of Inside Wiring, Memorandum Opinion and Order, 1 FCC Rcd. 1190, 1195 (1986); Detariffing the Installation and Maintenance of Inside Wiring, Second Report and Order, 59 R.R. 2d 1143, 1158 (1986).

[10] See In re Earth Satellite Communications, 95 FCC 2d 1223 (1983), aff'd sub nom., New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984); In re Ortho Vision, 69 FCC 2d 657 (1978), aff'd sub nom., New York State Commission on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982).

[11] 47 U.S.C. § 303(r).

[12] See City of New York v. FCC, 486 U.S. 57, 70 n.6 (1988).

regulate cable inside wiring.[13/] Neither the text of the 1992 Cable Act nor the legislative history of that statute, however, indicates that Congress intended Section 624(i) to limit the Commission's authority to regulate cable wiring.

Section 624(i) requires the Commission to "prescribe rules concerning the disposition, after a subscriber terminates service, of any cable installed by the cable operator within the premises of such subscriber."[14/] Congress enacted Section 624(i) to curb the damage cable operators were causing to the homes of subscribers by removing their wiring after termination of service.[15/] To read Section 624(i) as a limitation on the Commission's authority turns the intent of Congress on its head. With the passage of the 1992 Cable Act, Congress called for more federal regulation of cable, not less.[16/] Section 624(i) simply establishes the minimum level

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[13/] See, e.g., Continental Cablevision at 28 n.51 (applying a "commonplace of statutory construction" that the specific governs the general to find that Section 624(i) overrides the FCC's general Title I authority). The Supreme Court recently rebuked a lower court for similarly applying a timeworn canon of statutory construction in overriding an agency's interpretation of its own statute. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2411, 2415 (1995).

[14/] 47 U.S.C. 544(i).

[15/] S. Rep. No. 102-92, 102d Cong., 2d Sess. 23 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1156.

[16/] Congress wished the FCC to reassert authority that it had ceded to the states and local franchising authorities. See S. Rep. No. 102-92, 102d Cong., 2d Sess. 1 (1992), reprinted in 1992 U.S.C.C.A.N. 1133 (the legislation "provides for additional government oversight of the cable television industry") (emphasis added).

of regulation that the FCC must administer with regard to cable inside wiring.

3. Even within the rulemaking mandated by Congress in Section 624(i), the FCC has authority to adopt a definition of "premises" that includes dedicated subscriber lines located in common areas of an MDU.

As discussed above, Section 624(i) requires the Commission to promulgate rules regarding "the disposition, after a subscriber ... terminates service, of any cable installed ... within the premises of such subscriber."[17/] The Commission has broad discretion to define the term "premises" in any reasonable manner consistent with Congressional objectives.[18/] A definition of "premises" that encompasses dedicated subscriber lines is reasonable.

The Act does not define the term "premises," and Congressional intent as to its meaning is unclear. Congress stated that Section 624(i) "deals with internal wiring within a subscriber's home" and that it was "not intended to cover common wiring within the [MDU] building."[19/] Congress simply did not address the dedicated subscriber lines that lie between the common wiring and the individual dwelling units.

[17/] 47 U.S.C. § 544(i).

[18/] See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984)(when an agency's enabling statute is silent with respect to a term at issue, and the intent of Congress with respect to that term is not clear, the agency is free to adopt any permissible construction of the statute).

[19/] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 119 (1992) (emphasis added).

A definition of a subscriber's premises that includes dedicated wiring outside an individual dwelling unit, but within the common areas of an MDU is reasonable for two reasons. First, it falls within the broad definition of "premises" the Commission previously adopted in the context of telephone inside wiring, namely "a dwelling unit, other building, or a legal unit of real property such as a lot on which a dwelling unit is located."[20/] Second, it furthers the goals of the 1992 Cable Act. One of the primary objectives of the 1992 Cable Act was to promote competition in the monopolistic cable marketplace.[21/] Adopting a definition of "premises" to include dedicated subscriber lines furthers this goal by permitting alternate MVPDs to access existing cable home wiring without disrupting the interior of a subscriber's home.[22/]

[20/] Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, Report and Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd. 4686, 4692 n.26 (1990). This usage is also consistent with the common definition of the term "premises" -- "a building, buildings, or part of a building." Webster's Third New Int'l Dictionary 1789 (17th ed. 1976).

[21/] See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(6), (b)(1-2); H.R. Rep. No. 628, 102d Cong., 2d Sess. at 118 (1992).

[22/] In very similar circumstances, the Supreme Court recently deferred to an agency's definition of a term that its enabling statute left undefined. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407 (1995). Among the reasons the Court gave for holding the agency's definition reasonable were that, just as here, the agency's definition was supported by the ordinary understanding of the term, and the broad purpose of the enabling statute was furthered by the agency's definition. Id. at 2412-13.

B. <u>The New Joint Use Exemption in Section 652 of the Act Does not Limit the Commission's Authority To Relocate the Demarcation Point Within MDUs.</u>

In an obvious attempt to mislead the Commission, a number of cable interests suggest that relocating the cable demarcation point to where the common line connects to the dedicated line would contravene the new Joint Use exemption of the Act.[23] Adopted as part the Telecommunications Act of 1996, the Joint Use exemption states:

> JOINT USE - Notwithstanding subsection (c), a local exchange carrier may obtain, with the concurrence of the cable operator on the rates, terms, and conditions, the use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration, as determined by the Commission.[24]

The cable interests argue that Congress intended for this provision to give them complete and permanent control over all MDU cable wiring located between a building's stairwells and individual dwelling units, and to eliminate the Commission's authority to alter the demarcation point related to such wiring. A careful review of the legislative history underlying the provision, however, as well as its statutory context, reveals that Congress intended the Joint Use exemption: (i) to apply only to those cable transmission facilities that are located between the street and the

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[23] <u>See, e.g.</u>, CTA at 4; Continental Cablevision at 28-29; Cox Communications at 14-15; Marcus Cable at 4; Time Warner at 16-17. Section 652 regulates telephone company acquisition of cable companies and prohibits joint ventures between telephone companies and cable companies for the provision of video services.

[24] 47 U.S.C. § 652(d)(2).

home; and (ii) to allow telephone companies to share use of such facilities without violating the prohibition against joint ventures contained in Section 652 of the Act.

> 1. The legislative history underlying the Joint Use exemption indicates that Congress intended to limit its application to those cable transmission <u>facilities located between the street and the home.</u>

The Joint Use exemption in the 1996 Telecommunications Act is nearly identical to the exemption contained in H.R. 1555.[25] According to the Report filed by the House Commerce Committee on H.R. 1555:

> the [Joint Use] exemption would permit a carrier to obtain, by contract with a cable operator, <u>use of the "drop" from the curb to the home</u> that is controlled by the cable company, if such use was reasonably limited in scope and duration as determined by the Commission.[26]

The language "use of the drop from the curb to the home" indicates that the House intended the exemption to cover transmission facilities that begin from the curb (<u>i.e.</u>, outside the physical structure which houses the subscriber(s)) and extend to the home (<u>i.e.</u>, the physical structure which houses the subscriber(s)). The plain meaning of this language describes situations where the "last multi-user terminal" is on a pole or underground outside the home

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[25] The Joint Use exception contained in H.R. 1555 stated: "a common carrier may obtain, with the concurrence of the cable operator on the rates, terms and conditions, the use of that part of the transmission facilities of such a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration, as determined by the Commission." H.R. 1555, 104th Cong. 1st Sess. § 201 (1995).

[26] H.R. Conf. Rep. No. 458, 104th Congress, 2d Sess., 173 (1996)(emphasis added).

and the "transmission facilities" connect this terminal to the home. It is quite a stretch to suggest that "from the curb to the home" is intended to mean from the lockbox in an MDU stairwell or hallway to an apartment. If the House wanted to apply the exemption to internal wiring in MDUs, the Report would contain language to that effect.

2. The location of the Joint Use exemption in the Act indicates that it was intended to create an exception to the Section 652 prohibition on joint ventures rather than to limit the Commission's authority to regulate cable home wiring.

Section 652 of the Act governs the ability of telephone companies to acquire cable companies and prohibits joint ventures between these companies if they operate in the same market. The Joint Use provision is an exception to this general prohibition, and prescribes the circumstances under which a telephone company may seek to share a cable operator's wire.

By contrast, the Act's cable home wiring provisions and the rules promulgated thereunder address instances where a cable operator is no longer using the home wiring because its former subscriber has terminated the service.[27] If Congress intended the Joint Use exemption to restrict the application of the cable home wiring rules, or to limit the Commission's authority to adopt new home wiring rules, it would have placed the exemption in Section 624(i) of the Act, which governs cable home wiring, rather than in the section concerning telco/cable buy-outs and joint ventures. The Joint Use exemption simply was not intended to

[27] 47 U.S.C. § 544(i).

govern cable inside wiring nor was it intended to limit the Commission's authority to regulate cable inside wiring.

The fact that the Joint Use exemption concerns only LECs, rather than all MVPDs, provides further evidence that Congress never contemplated applying the Joint Use exemption to the home wiring context. Congress was well aware that the parties seeking to offer video services in competition with cable operators include not only LECs but also several classes of alternative providers such as DBS, MMDS, and SMATV operators. If Congress intended the Joint Use exemption to apply in the home wiring context, as the cable industry suggests, it would have applied the exemption to all MVPDs seeking to use a cable operator's wire, not just to the LECs.

C. Redefining the Cable Demarcation as Bartholdi Has Proposed Would Not Constitute an Unconstitutional Taking Under the Fifth Amendment.

A number of parties argue that moving the demarcation point for cable home wiring in MDUs would be an unconstitutional taking of property without just compensation. Franchised cable operators claim that such action would constitute confiscation of their wiring,[28] while the Independent Cable and Telecommunications Association[29] and various real estate

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[28] See, e.g., CTA at 6-7; Continental Cablevision at 12 n.19; Cox Communications at 15-17; NCTA at 36; Time Warner at 27-28; TKR Cable at 4.

[29] ICTA at 11-19.

interests[30] contend that this would dispossess MDU owners of their property.[31] These arguments have no merit because any wiring that would be affected by relocating the demarcation was installed with the consent of both the cable operator and the MDU owner. The cable home wiring rules do not require either the cable operator or the MDU owner to give up their property.[32] These

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[30] See, e.g., Building Owners and Managers Association International at 5; Charles Dunn Co. at 1; CHIP at 1; Home Builders of Maryland at 1.

[31] The Commission rejected this unconstitutional takings argument in its First Order on Reconsideration, MM Docket No. 92-260, FCC 95-503, ¶ 9 (rel. Jan. 26, 1996). Moving the demarcation point further than twelve inches outside the MDU residence is irrelevant to any further "takings" analysis. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436-37 (1982) ("[C]onstitutional protection for the rights of private property [do not] depend on the size of the area permanently occupied.").

[32] Even in states with mandatory cable access laws, MDU owners typically consent to the installation of cable. In those rare instances where the installation is ordered by a court, the MDU owner is compensated for the taking of the physical space occupied by the wire. Thus, transferring control of the wire to the MDU resident does not cause any uncompensated taking of the MDU owner's property. Nor does it cause a taking of the cable operator's wire because the operator always has the right and opportunity to remove it. See also Yee v. City of Escondito, California, 112 S. Ct. 1522 (1992); Warschauer Sick Support Soc'y v. New York, 754 F. Supp. 305, 307 (E.D.N.Y. 1991) (New York law requiring cemetery plots to be offered for sale to the cemetery at original cost plus 4% before sold on the open market is not a taking of property).

Some cable operators also argue that the Commission should not adopt Bartholdi's proposed demarcation because relocating the demarcation point would transfer control over their wiring to competing MVPDs. See, e.g., CTA at 5 n.1 ("the Commission's proposed rules would permit a competitor to acquire use, and even ownership, of wiring on the subscriber side of wherever the demarcation point may be set"); Continental Cablevision at 24-27 ("transferring control over MDU hallway wiring back and forth between providers" will increase the likelihood of signal leakage and other technical problems); TKR Cable at 7 (arguing that it should not be "required to surrender its MDU inside wiring to a
(continued...)

rules merely regulate the manner in which that wiring is sold, removed, or abandoned upon voluntary termination of service.

Moreover, the cable home wiring rules do not compel the permanent physical possession of any property by a third party.[33] In this respect, the cable home wiring rules operate in the same manner as the Pole Attachments Act[34] by regulating wire which has been installed with the consent of all affected parties. Significantly, the Supreme Court has held that the Pole Attachments Act does not cause a taking of property because the statute does not require a utility to give up pole space to a cable company but merely regulates the use of that space after the utility has consented to the installation of cable on its poles.[35]

D. Relocating the Demarcation Point as Bartholdi Has Proposed Is a Necessary Step in Giving Consumers a Meaningful Choice of Broadband Services.

1. Individual dedicated lines in MDUs are bottleneck facilities.

The franchised cable operators argue that they need to retain control of dedicated cable lines in MDUs to compete in

[32](...continued) competitor"). This is not true. Relocating the demarcation as Bartholdi proposes would not give competing MVPDs any ownership over the subscriber's portion of the wire. The subscriber would continue to own and control that portion of the wire on the subscriber's side of the demarcation point.

[33] Cf. Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982).

[34] 47 U.S.C. § 224.

[35] See FCC v. Florida Power Corp., 480 U.S. 245 (1987).

the future by adding telephony, voice, and data to the video services already provided on the cable.[36] This argument recognizes the reality that lies at the heart of Bartholdi's request to move the cable demarcation point to an accessible place -- the dedicated cable lines are a "bottleneck facility" and whoever controls that bottleneck controls access by MDU residents to the broadband services marketplace.

None of the franchised cable operators dispute that they currently enjoy monopoly control over that bottleneck facility in virtually every MDU in America. An inaccessible demarcation point ensures that the incumbent franchised cable companies will retain that control.

The franchised cable operators want to expand their services and use their control over the bottleneck facility to keep competition out. But that is not a technological innovation nor does it promote true competition. Rather, it is the classic case of expanding a monopoly through the control of bottleneck facilities.

If competition is to improve the delivery of broadband services, then the Commission can and should promote competition on the basis of price and service and discourage the use of bottleneck facilities to gain a competitive advantage. Moving the cable demarcation point to an accessible place in MDUs is a significant and necessary step in that direction because it transfers control

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[36] See, e.g., Adelphia Communications at 2; CTA at 4; Continental Cablevision at 13-21; Cox Communications at 22; Marcus Cable at 3-4; NCTA at 7; Time Warner at 8-10; TKR Cable at 7.

of the bottleneck facility from the incumbent cable company to the consumer. All of the commenters -- with the exception of incumbent franchised cable companies -- agree with this proposition, including state regulators and consumer groups, and support moving the demarcation point to a readily accessible place.

The argument that Bartholdi can and should be required to replicate these bottleneck facilities is completely fatuous. As the numerous commenters for the real estate industry uniformly state, MDU owners have no intention of allowing multiple dedicated lines in their buildings and, in the absence of access legislation, the Commission has no authority to compel MDU owners to accept multiple drop lines.[37]

2. Consumer control of the bottleneck facilities will promote technological innovation.

Once consumers control the bottleneck facilities, competition, driven by consumer demand, will promote technological innovation. For example, the franchised cable operators claim it is impossible for a single coaxial cable to carry the broadband

[37] Liberty's Comments at pages 6-10 vividly describe the difficulties Bartholdi faces when attempting to rewire MDUs served by incumbent cable operators. Some cable operators contend that these difficulties are unfounded. See, e.g., Continental Cablevision at 23; Time Warner at 20. Continental Cablevision, for example, asserts that Bartholdi should simply install a second distribution system in such buildings just as Continental does when it enters an MDU as the second service provider. Unlike franchised cable operators, however, Bartholdi and other alternative MVPDs do not have the right under most state mandatory access laws to wire a building without the consent of the owner. Moreover, the record unequivocally demonstrates that both residential and commercial landlords strongly object to the installation of redundant cable wiring in their buildings. See, e.g., CHIP at 2; National Housing Partnership at 2; Pache Management Company at 1; Ash Tree Apartments at 1; Live Oak Properties at 1.

services of multiple MVPDs.[38] Yet DirecTV states that it has developed technology which will allow a single coaxial cable to carry both a traditional cable service and DBS service in MDUs.[39] Bartholdi has actually tested this technology and confirms that it can deliver both conventional cable service and DBS service on a single coaxial cable in an MDU.

If consumers in MDUs control their individual cable lines, they will be able to demand the shared use of those lines by multiple MVPDs. Market driven forces will create the technology to meet that consumer demand, just as the market has delivered the technology to meet the demand for shared use of coaxial cable in single family homes. But if the franchised cable operators control the bottleneck, then innovative shared use technology will never reach the MDU marketplace because the incumbent will not tolerate competition on its "own" wire.

3. Consumer control of the bottleneck facilities will promote the unbundling of services.

The franchised cable operators also make the incorrect assumption that bundling telephone, voice, data and video together on a coaxial cable is the only way to deliver all of those

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[38] See, e.g., Cox Communications at 19 ("it is not currently possible for multiple providers simultaneously to tap in to a single broadband facility"); CTA at 4 ("at the present time it is not technically practicable for MVPDs to share a cable"); Marcus Cable at 6 ("it is technologically and economically infeasible for dual providers to use a single coaxial cable drop"); TKR Cable at 4-5 ("it is currently impracticable for more than one service provider to use the same wire at the same time").

[39] See DirecTV at 3. DirecTV installers routinely put a "diplexer" on coaxial cable in single family homes to allow the shared use of cable by DirecTV and the local cable company.

services into the home. But, in reality, many vendors of cable and telephone service can and do physically "unbundle" their services and deliver them on different wires -- twisted wire for telephony and coaxial cable for video.

If consumers in MDUs control their own individual cable lines -- just like they control their own individual telephone lines -- they will be able to demand that each vendor "bundle" or "unbundle" their broadband services and use whatever wires the consumer directs. A vendor who offers only "bundled" services on one wire then has a choice. It can either make its "bundled" service on one wire competitive to the "unbundled" services or unbundle its service and compete on an "a la carte" basis over the twisted pair and coaxial cable as determined by the consumer. In either case, the consumer's ability to choose both the services and the wires upon which they are delivered forces all the vendors to make their broadband offerings competitive on the basis of price and service.[40/] But if the consumer does not control the bottleneck into their home, then the incumbent franchised cable company will be able to charge a premium for its "bundled" service solely because it controls the bottleneck for delivering services and can keep competitors out, not because it offers a better or cheaper service.

[40/] In those limited situations where a consumer wants to subscribe simultaneously to two service providers with bundled broadband services, the consumer should be free to ask for a second wire into its dwelling unit. Consumer demand and market forces should dictate how many wires enter a consumer's dwelling unit, not federal regulations.

4. Consumer control of the bottleneck facilities resolves some -- but not all -- of the concerns of MDU owners.

Some commenters try to minimize the need to move the demarcation point to an accessible place by raising extraneous concerns about MDU owners acting as "gatekeepers."[41] But the cable home wiring rules assume that the MDU gatekeeper has already opened the "gates" to more than one MVPD.[42] Moving the demarcation point to an accessible place will encourage, though not require, MDU gatekeepers to open the access gates further. Leaving the demarcation point at its current location will discourage opening of the access gates.

As the various commenters indicate, MDU owners have multiple concerns about the installation of cable on their property.[43] Those concerns fall into three categories: (1) aesthetics -- space and aesthetic constraints on multiple individual dedicated lines; (2) security -- MDU owners need to control the number of construction and service personnel on their property; and (3) revenue -- MDU owners want compensation for the use of their property. Moving the demarcation point addresses only two of these concerns -- aesthetics and security.

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[41] See, e.g., Charter Communications and Comcast Cable Communications at 17; Continental Cablevision at 23; Cox Communications at 27; Marcus Cable at 7; NCTA at 15-21.

[42] Nothing in the cable or telephone inside wiring rules requires the MDU owner to allow the installation of cable or wire at the building.

[43] See supra note 37 and comments cited therein.

When Bartholdi uses the existing individual dedicated lines in MDUs, there is virtually no aesthetic change in the visible areas of the building and the number of site visits by technicians is kept to a minimum. But neither the cable home wiring rules nor moving the demarcation point will force the "gates" open when the MDU owner wants them closed for reasons other than aesthetics or security -- such as money. The demand for compensation will remain regardless of the location of the demarcation point for individual dedicated lines. As Liberty said in its original Comments, the MDU owner's concern for compensation is best addressed on a state by state basis in the context of access legislation. It cannot and should not be a basis for allowing the demarcation point to remain inaccessible. Regardless of whether some MDU owners demand compensation from MVPDs for access to their buildings, the Commission should not delay moving the demarcation point to an accessible location.

5. <u>Consumer control of the bottleneck facilities will promote, rather than impede, facilities-based competition.</u>

Several cable interests also argue incorrectly that relocating the cable demarcation point as Bartholdi has proposed would be contrary to Congress' express intent to promote facilities-based competition because it would discourage competing MVPDs from installing redundant dedicated lines to serve MDU residents.[44] The development of facilities-based competition,

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[44] <u>See, e.g.</u>, Adelphia at 2-3; CTA at 3-4; Continental Cablevision at 6; Cox Communications at 19; Marcus Cable at 3-4; NCTA at 6-9; Time Warner at 5; TKR Cable at 4.

however, is not dependent upon the installation of several dedicated lines to a single apartment, nor is such duplication desirable as demonstrated by the hundreds of letter comments filed in this proceeding by commercial and residential property interests. The only prerequisite to vigorous facilities-based competition among telecommunications service providers is the ability of consumers to connect their home wiring to the separate facilities of competing providers.[45] To the extent that relocating the demarcation point increases the ability of consumers to make that connection, Bartholdi's proposal would actually advance the objective of facilities-based competition, rather than impede it, as these parties contend.

II. THE COMMISSION SHOULD OPEN A NEW RULEMAKING FOR TESTING SIGNAL LEAKAGE IN MDUs.

Bartholdi believes that each MVPD should be responsible for complying with the Commission's signal leakage standards with respect to all wiring it uses to provide service. Bartholdi voluntarily instituted a program to measure signal leakage on all

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[45] The cable interests acknowledge that all MVPDs intend to install their own common (i.e., non-dedicated) distribution facilities in the MDUs they serve. See, e.g., Time Warner at 7 ("It is not seriously contended by any party that any portion of the riser be turned over to a competitor"). But they appear to assume incorrectly that cable and telephone companies are the only facilities-based providers of broadband services. Facilities-based competition includes all competitors who install telecommunications facilities, not just those that put wires in the public streets. Bartholdi and other MVPDs (including SMATV, MMDS, and DBS companies), for example, routinely install independent transmission and reception facilities. Moreover, many SMATV companies provide telephone service to MDU residents by installing private telephone switches and twisted copper pair wires.

of its systems and never has found a leak, not even in the building where Bartholdi shares the use of dedicated lines with Time Warner.

During the course of implementing its testing program, however, Bartholdi discovered that the existing approved technical procedures for testing signal leakage are outmoded when applied to multiple MVPDs operating in close proximity to each other in an MDU. When two MVPDs are in the same building, for example, the testing equipment cannot determine which MVPD is the source of the leak. Therefore, at least one MVPD should put some kind of "marker" on its signal so the testing equipment can determine whose signal is leaking. And tests for signal leakage inside a building do not always accurately show whether there is a threat of interference with aeronautical frequencies outside the building. For these reasons, the Commission should open a separate rulemaking proceeding to address the technical issues related to the mechanics of testing signal leakage in MDUs.

CONCLUSION

The Commission's rules and policies relating to broadband inside wiring should conform to the principles set forth in the